Supreme Court of the United States

OCTOBER TERM 1947

No. 739- 740

ANTHONY T. AUGELLI, Trustee in Bankruptcy of JOHN NIZOLEK FURNITURE CO., INC., Bankrupt,
Petitioner,

vs.

OHIO FINANCE CORPORATION,
Respondent,

and

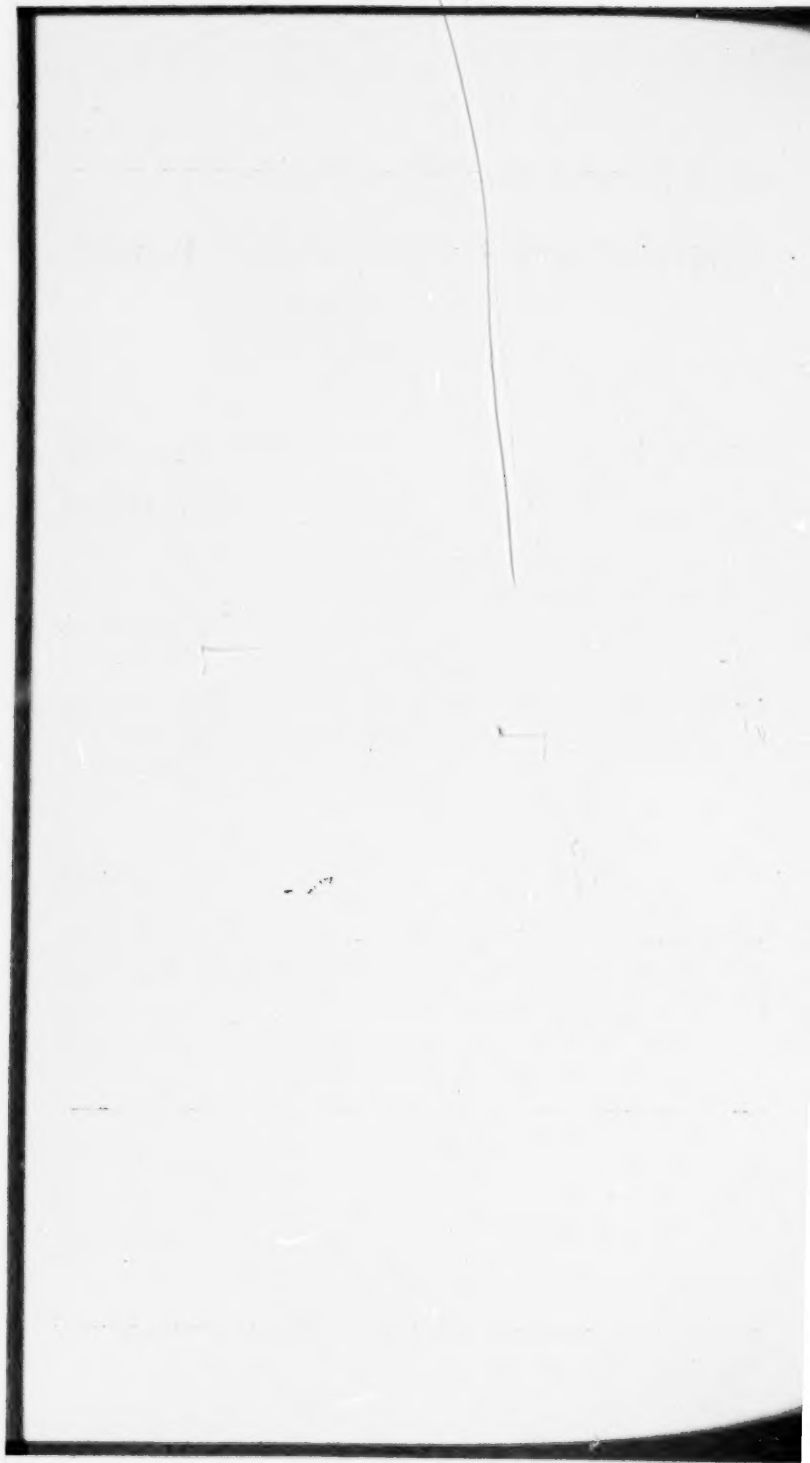
ANTHONY T. AUGELLI, Trustee in Bankruptcy of NIZOLEK FURNITURE & CARPET CO., INC., Bankrupt,
Petitioner,

vs.

OHIO FINANCE CORPORATION,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

SAMUEL MILBERG,
BENJAMIN GROSS,
Attorneys for Petitioner.



INDEX

Argument

POINT I

Table of Cases Cited

Supreme Court of the United States

OCTOBER TERM 1947

No.

ANTHONY T. AUGELLI, Trustee in Bankruptcy of JOHN NIZOLEK FURNITURE CO., INC., Bankrupt,
Petitioner,

vs.

OHIO FINANCE CORPORATION,
Respondent,

and

ANTHONY T. AUGELLI, Trustee in Bankruptcy of NIZOLEK FURNITURE & CARPET CO., INC., Bankrupt,
Petitioner,

vs.

OHIO FINANCE CORPORATION,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Anthony T. Augelli, Trustee in Bankruptcy of Nizolek Furniture & Carpet Co., Inc., et al., prays that Writs of Certiorari issue to review the final judgment of the Circuit Court of Appeals for the Third Circuit entered on February 9, 1948.

Questions Presented

Where the respondent knowingly contrary to the terms of the written agreement between it and the bankrupts providing for the sale or assignment of accounts receivable to respondent, permitted the bankrupts to exercise a general dominion over such accounts and permitted the commingling of moneys received upon such assigned accounts with the bankrupts' general funds, and permitted the proceeds of such accounts to be used by the bankrupts in their general business, and knowingly acquiesced to the consistent violation of the terms of the written agreements and assignments and deviation therefrom by the bankrupts, all of which resulted in a secret lien in favor of the respondent and legal fraud upon the general creditors of the bankrupts, can the respondent assert that the letter of the contract should prevail over the course of conduct pursued by the bankrupts, with respondent's knowledge and consent?

Statement

The contracts of sale or assignment of the accounts provide among other things "all amounts so collected shall be held in trust and not used by the second party (bankrupts) and the full payment thereof remitted to the first party (respondent) by postal money order or check not later than the next business day following any collection" (T. p. 19a).

The undisputed evidence adduced before the Referee indicated that the bankrupts used the proceeds of these accounts in their own business and remitted to the respondent by their own checks not drawn on any segregated or trust account as the agreement provided (T. pp. 88A, 95A, 96A, 103A, 104A).

It is conceded that there was commingling of the proceeds of the assigned accounts with the bankrupts' general funds, and this was the consistent practice to the knowledge of respondent over a period of years. The total amount of the transactions between the parties over a period of some years on these assigned accounts involved approximately $206,000.00. The amount involved in this litigation is approximately $22,000.00.

The District Judge, in his opinion (top of p. 80A), stated that, "The only privilege reserved to the bankrupts under the 'collection agreements' was that of collecting the accounts receivable as 'agent of and in trust for the' corporation. The reservation of this privilege and advantage to the bankrupts and convenience to the corporation did not invalidate the assignments. The use of the proceeds by the bankrupts, an admitted fact stressed by the Trustee in bankruptcy, was clearly in violation of the expressed provisions of the said agreements. It appears from the undisputed testimony that this use of the proceeds was a misappropriation of funds which the officers of the bankrupts successfully concealed from the auditors of the corporation until January 1942."

The District Judge in his findings failed utterly to give effect to the undisputed evidence relating to the action and conduct of the parties in connection with the performance of the written agreements.

The Circuit Court of Appeals affirmed the District Court on the opinion below (T. p. 179).

Petitioner's Contention

It is the contention of the petitioner that the Court below in affirming the judgment of the District Court failed to give legal effect to the uncontradicted proofs indicating the general commingling of the proceeds of the sold or assigned accounts with the moneys of the bankrupts, con-

trary to the terms of the written agreements, all to the knowledge of the respondent.

It is petitioner's contention that the findings by District Judge, as quoted above in the Statement, that the bankrupts "misappropriated" the funds in question was not a sufficient basis for the judgment entered in view of the knowledge of such misappropriation by respondent, contrary to the terms of the written agreement.

BRIEF IN SUPPORT OF PETITION

Opinion Below

The Circuit Court of Appeals for the Third Circuit affirmed the District Court for the District of New Jersey on the opinion of the District Judge.

Questions Presented

The questions presented are stated in the petition (p. 2).

Statement

The statement of the case is contained in the petition (pp. 2, 3).

ARGUMENT

POINT I

The judgment of the Circuit Court of Appeals for the Third Circuit affirming the judgment of the District Court is erroneous.

The District Judge in his opinion, that portion thereof quoted in the statement (p. 3), relied upon, among other authorities, *Benedict* v. *Ratner,* 268 U. S. 353, and *Parker* v. *Meyer,* 37 Fed. (2d) 556.

Although in *Benedict* v. *Ratner,* supra, the agreement provided for the transferor's right to use the proceeds as it might see fit, it is our contention that it is authority in our case, because here, by the conduct of the parties the same result was reached, with the consent and acquiescence

of the respondent, as was reached in the cited case, by expressed agreement between the parties.

Parker v. *Meyer*, also relied upon by the District Judge, was per curiam opinion of the Circuit Court of Appeals of the Fourth Circuit. This case might be considered as authority for the holding by the District Court in our case, but the validity of this case as authority is substantially impugned by the case of *Irving Trust Company* v. *Finance Service Company*, 63 Fed. (2d) 694, an opinion by Judge Learned Hand in the Second Circuit Court of Appeals. Judge Hand in this case said,

> "As suggested above, it would have been entirely proper for the bankrupt to use the whole of the collections coming in during the earlier part of the period before due date, building up enough towards its end to meet its commitments, or indeed to use them all. In Parker v. Meyer, 37 Fed. 2nd 556, the Fourth circuit construed a somewhat similar contract otherwise. *We are not sure that we should have reached the same result*, but at most the question was one of the security intended, and the evidence apparently enough to persuade the court that the borrower was to 'earmark' the collections. In Re Bernard & Katz, 38 Fed. 2d 40 (C. C. A. 2), the borrower got no power over the accounts until he had substituted others as security."

The uncontroverted facts in our case, notwithstanding the statement by the District Judge in his opinion, bring it within the rules laid down in *Parker* v. *Meyer* and *Irving Trust Company* v. *Finance Service Company*. There is a substantial conflict in these two Circuits upon this question. Had the District Court and the Circuit Court of Appeals in our case considered the ruling in the *Irving Trust Company* v. *Finance Service Company* as authority, the findings would have been in favor of this petitioner.

CONCLUSION

It is respectfully submitted that a Writ of Certiorari issue out of this Honorable Court directed to the Circuit Court of Appeals for the Third Circuit, to the end that this cause may be reviewed and determined by this Court and that the judgment of the Circuit Court of Appeals for the Third Circuit may be reversed.

Respectfully submitted,

SAMUEL MILBERG,
BENJAMIN GROSS,
Attorneys for Petitioner.